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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MEMPHIS FIRE DEPARTMENT, *et al.*,
Petitioners,

v.

CARL W. STOTTS, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, AMICUS CURIAE, IN SUPPORT OF PETITIONERS

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QUESTION ADDRESSED

The judgment at issue herein set aside a neutral city-wide seniority system and substituted a racially segregated seniority system in order to preserve one minority's current "share" of various job categories in the Memphis, Tennessee fire department. The question addressed in this brief is whether the district court erred as a matter of law in entering a preliminary injunction prohibiting the Memphis Fire Department from conducting lay-offs according to the city-wide seniority system, where

(a) there was no adjudication of past discrimination and no indication that the parties to a 1980 consent decree that the court purported to be interpreting had intended to modify the existing seniority system, and the only basis for the order was the court's view that the "purpose" of the consent decree had been to achieve and maintain racial proportionality in all fire department job categories;

(b) where there was no valid finding that the seniority system was not *bona fide*, that the lay-offs were racially motivated or that racial discrimination in promotion and hiring continued to exist; and

(c) where there was no indication that the black fire personnel accorded retroactive seniority by the preliminary injunction had been victims of discrimination in the past.

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CONSENT OF THE PARTIES

Petitioners and Respondents have consented to the filing of this brief and their letters of consent have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

The Anti-Defamation League of B'nai B'rith was organized in 1913 as a section of B'nai B'rith, the oldest civic service organization of American Jews, to advance good will and mutual understanding among Americans of all creeds and races and to combat racial and religious prejudice in the United States. The Anti-Defamation League is vitally interested in protecting the civil rights of all persons, be they minority or

majority, and in assuring that every individual receives equal treatment under the law regardless of his or her race or religion.

Among its many other activities directed to these ends, the Anti-Defamation League has in the past filed amicus briefs in this Court urging the unconstitutionality or illegality of racially discriminatory laws or practices in such cases as *e.g.*, *Shelley* v. *Kraemer*, 344 U. S. 1 (1948); *Sweatt* v. *Painter*, 339 U. S. 629 (1950); *Brown* v. *Board of Education*, 347 U. S. 483 (1954); *Colorado Anti-Discrimination Comm'n.* v. *Continental Air Lines, Inc.*, 372 U. S. 714 (1963); *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409 (1968); *Sullivan* v. *Little Hunting Park*, 396 U. S. 229 (1969); *San Antonio Ind. School Dist.* v. *Rodriguez*, 411 U. S. 1 (1973); *De Funis* v. *Odegaard*, 416 U. S. 312 (1974); *Runyon* v. *McCrary*, 427 U. S. 160 (1976); *McDonald* v. *Santa Fe Trail Transport Co.*, 427 U. S. 273 (1976); *University of California Regents* v. *Bakke*, 438 U. S. 265 (1978); *County of Los Angeles* v. *Davis*, 440 U. S. 625 (1979); *United Steelworkers of America* v. *Weber*, 443 U. S. 193 (1979); *Fullilove* v. *Klutznick*, 448 U. S. 448 (1980); and *Boston Police Patrolmen's Ass'n, Inc.* v. *Castro*, 51 U.S.L.W. 4566 (1983).

The Anti-Defamation League shares the concern of the courts below that all levels of public employment be integrated to reflect the heterogeneous nature of our society. Alternatives supported by the Anti-Defamation League to achieve this result include outreach programs to identifiable underrepresented minorities, special training and educational assistance for deprived applicants, and the consideration of merit-based alternatives to strict seniority systems. The Anti-Defamation League cannot accept, however, the concept adopted in the decision below that each ethnic group is entitled to proportional representation in each category of public jobs. Such a concept is wholly contrary to the basic constitutional principles that all persons are entitled to freedom from discrimination directed against them on grounds of race, religion, creed, sex or national

origin, and that each person has a right to be judged on the basis of his or her individual merits—not on the basis of the ethnic or racial group to which he or she belongs. It is these fundamental principles that form the basis for our argument for reversal of the decision below.

STATEMENT OF THE CASE

In 1974, the United States Department of Justice brought suit against the City of Memphis alleging that it had violated Title VII, 42 U. S. C. § 2000e *et seq.*, by engaging in a pattern and practice of race and sex discrimination in hiring and promoting city employees. The case was settled that same year by a consent decree pursuant to which the City agreed to "undertake as its long term goal, subject to the availability of qualified applicants, the goal of achieving throughout the work force proportions of minority and female employees in each job classification approximating their respective proportions in the civilian labor force." To achieve this goal for black employees, the City agreed to attempt to fill at least 50% of all vacancies with qualified black applicants. Insofar as promotions, transfers and assignments were concerned, the decree required the City to compute every employee's seniority based on the person's total seniority in jobs with the City. (App. to Pet. for Cert. A 55, A 56.)

In 1977, respondent Carl W. Stotts filed a class action against the Memphis Fire Department alleging that, despite the 1974 decree, the department's hiring and promotion practices still violated Title VII, 42 U. S. C. § 1981, and 42 U. S. C. § 1983. The *Stotts* case was later consolidated with a similar action brought by Fred L. Jones individually, alleging that his failure to receive a promotion within the fire department was the result of racial discrimination.

In 1980, the parties to the *Stotts* and *Jones* cases entered into a consent decree. In so doing, the fire department specifically denied liability, stating that it did "not thereby admit any violations of law, rule, or regulation with respect to the allegations made by plaintiffs in their complaints." (App. to Pet. for Cert. A 60.)

The stated intent of the 1980 consent decree was "to parallel and supplement the relief" provided in the 1974 decree. (*Ibid.*) Thus, the same long-term goal of proportional representation was restated, as was the 50% interim black hiring quota. In addition, in the 1980 decree the fire department adopted the goal of promoting black applicants for positions above entry-level job classifications in proportion to their representation in the applicant pool, setting a promotion goal of at least 20% black promotions annually for each civil service classification or uniformed rank. The decree also provided for certain promotions and awarded $60,000 in back pay to named individuals. The 1980 decree did not grant retroactive seniority to anyone and indeed did not even refer to the city-wide seniority system the City was required to use under the 1974 decree. Nevertheless, the decree did provide that it was not intended to conflict in any way with the earlier agreement. (*Id.* at A 60, A 64-66.)

In May, 1981, the City of Memphis announced that it was experiencing financial difficulties that would require a reduction in personnel in certain city jobs for the 1981-1982 fiscal year. The City stated that it would lay off employees on a last-hired, first-fired basis, with seniority determined by length of service with the City. Because many of the jobs being eliminated were higher ranking positions, senior employees were given the right to "bump" employees in lower ranking positions rather than being laid off. Thus, although higher-ranking jobs were being eliminated, the ability to drop down to the lower ranks meant that the employees actually laid off were ordinarily those in the lower ranks with the least seniority. This system of laying off

employees was consistent not only with the city-wide seniority system required by the 1974 consent decree, but also with a Memorandum of Understanding between the City and the union representing the firefighters, Local 1784 of the International Association of Fire Fighters.

Before the layoffs went into effect, respondents obtained a temporary restraining order that prohibited the fire department from reducing in rank any black employee. At the hearing on respondents' motion for a preliminary injunction to confirm this relief, evidence was presented showing that since 1974 the minority hiring goal of 50% had been met or exceeded and that 16% of the employees promoted in that period had been black. In addition, the overall representation of blacks in the fire department had increased from 3%-4% to approximately 11%, though it was still far below the number of black workers in the labor force generally. If the layoffs had been carried out as originally planned, the overall percentage of black employees in the fire department would have declined by only one percent. However, black employees generally had less seniority in higher-ranking job categories, and thus 60% of the employees affected by the demotions would have been black.

After hearing the evidence, the district court granted respondents' motion, enjoining the defendants from demoting or laying off any black employees in certain job categories if the effect would be to decrease the proportion of blacks in that category. In entering this order, the district court first found that the 1980 consent decree did not contemplate the method to be used in laying off personnel. It then held that the lay-offs themselves were not decided upon as a result of a purpose or intent to discriminate, but that the *effect* of using a city-wide seniority system to lay off employees was discriminatory and hence that system was not *bona fide*. The court also stated that, while the City had never admitted discrimination in the consent decrees, it would be "naive" not to believe that there had been such discrimination. (Oral ruling granting preliminary in-

junction, App. to Pet. for Cert. A 73.) Indeed, based on the statistical evidence presented, the court went so far as to "take judicial notice of past racial discrimination in the Fire Department." (*Id.* at 74.) Under these circumstances, the court held that it had the power to enter an injunction to preserve the existing racial proportions in a wide variety of individual job classifications.

On appeal, the Sixth Circuit affirmed the grant of injunctive relief. *Stotts* v. *Memphis Fire Dept.*, 679 F. 2d 541 (1982). In its opinion, the court rejected the district court's holding that a discriminatory effect was sufficient to invalidate the facially neutral seniority system. *Id.* at 551 n.6. Nevertheless, it found that the district court was justified in overriding that system in order to achieve the purposes set forth in the 1980 decree. Although the decree was admittedly silent on the issue of lay-offs, the court held that the fire department was under an affirmative obligation to prevent erosion in the progress toward racial proportionality that had already been achieved under the decree.

SUMMARY OF ARGUMENT

As the Sixth Circuit noted, in order to justify the issuance of a preliminary injunction, the movant must demonstrate a probability of success on the merits of the underlying claim and irreparable harm if the injunction is not issued. In addition, the movant must show that the harm from a refusal to issue the injunction will outweigh any harm that it might cause and that the issuance of the injunction is in the public interest. 679 F. 2d at 560. In this case, these tests clearly were not met and hence the trial court abused its discretion in issuing the order.

The Sixth Circuit erred in holding that the 1980 consent decree, coupled with the statistical evidence, demonstrated a probability of success on the merits of plaintiffs' claim. There

must be a jurisdictional basis for the issuance of a quota-type remedy in the form of either an agreement between the parties or a finding of liability. Here, it is clear that the fire department did *not* agree in 1980 to insulate minorities from the effects of necessary lay-offs. Nevertheless, the Sixth Circuit implied such an agreement based on the assumption that the purpose of the consent decree was to achieve and maintain racial proportionality in each and every fire department job category. In so doing, the court failed to follow a number of decisions by this Court holding that unbargained-for liabilities may not be imposed on parties to consent decrees based on the court's after-the-fact determination of the "purpose" of such decrees. See, *e.g.*, *United States* v. *Armour & Co.*, 402 U. S. 673, 681-82 (1971). In addition, the "purpose" on which the Sixth Circuit based its decision was clearly improper: while eliminating discrimination in hiring and promotion policies lies at the heart of constitutional and statutory civil rights guarantees, the use of quotas in the workplace, however benign their apparent intent, is repugnant to the basic concept of individual rights that underlie those guarantees.

Nor was there a proper finding of liability on which to base the court's grant of injunctive relief. The lower court's decision to take "judicial notice" of pre-1980 discrimination in hiring and promotion was clearly improper, as was the Sixth Circuit's holding that the department's pre-1980 employment statistics adequately indicate the probability of success on the merits. Furthermore, even if the plaintiffs could establish discrimination in hiring and promotions prior to 1980, that finding alone would not provide a basis for enjoining the functioning of the City's *bona fide* seniority system in 1981. If the court was attempting to fashion additional relief for pre-1980 discrimination through the use of retroactive seniority, it could only do so for the identifiable victims of past discrimination. *Bona fide* seniority systems are protected by Title VII even if they perpetuate the effects of past discrimination; thus, class-wide grants of retroactive seniority are clearly barred. *Inter-*

national Brotherhood of Teamsters v. *United States*, 431 U. S. 324 (1977).

On the other hand, if the court was not attempting to remedy past discrimination, it had no power to act simply to maintain racial balance. A court cannot intervene if, after racial discrimination has been eliminated, new circumstances not related to discrimination lead to a decrease in the number of minorities in a particular job category or in the work-force in general. *Pasadena City Board of Education* v. *Spangler*, 427 U. S. 424 (1976). Here, there has apparently been progress in the hiring and promotion of minorities; there has been no finding that discrimination in those areas had not been eliminated by 1981. Furthermore, the district court itself specifically found that the layoffs were not improperly motivated. Under these circumstances, the court had no power to abrogate a *bona fide* seniority system in order to protect the "progress" that had been made toward racial proportionality in various job categories.

The courts below also erred in balancing the harms and the public interest at stake in this proceeding. The injunction was issued to protect certain black employees from being demoted or laid off; there was no finding that any of these employees had been victims of discrimination in the past. Inevitably, the ruling injured white employees with more seniority who would not have been demoted or laid off but for the issuance of the injunction. By according retroactive seniority to black employees on a class-wide basis without reference to whether they were identifiable victims of discrimination and ignoring the concommitant harm inflicted on white employees solely because of their race, the courts below failed to perform "the delicate task of adjusting the remedial interests of discriminatees and the legitimate expectations of other employees innocent of any wrongdoing." *International Brotherhood of Teamsters* v. *United States*, 431 U. S. 324, 372 (1977).

ARGUMENT

I. The Lower Courts Erred In Finding That Plaintiffs Had Established A Probability of Success On The Merits.

A. Courts May Not Impose Additional Obligations On A Party To A Consent Decree Based On Their View Of The "Purpose" Of The Decree.

The courts below erred in finding that plaintiffs had established a probability of success on the merits of their case attacking the use of a *bona fide* seniority system to lay off fire department employees. In its decision, the Sixth Circuit relied primarily upon its determination that the preliminary injunction was necessary to implement promises made by the Memphis Fire Department to its minority employees in the 1980 consent decree. The Sixth Circuit implied such promises from the decree despite the fact that the fire department had never agreed to grant its minority employees special seniority rights or to protect them from the operation of its *bona fide* seniority system. To the contrary, the 1974 consent decree specifically provided that seniority for all employees "covered under this decree shall be computed as the total seniority of that person with the City." While the 1980 consent decree was silent on the subject of seniority, it provided that its provisions were not intended to conflict with any of the provisions of the 1974 decree.

Under these circumstances, the Sixth Circuit's reasoning must be rejected. The 1974 and 1980 consent decrees were entered into without any finding or admission of liability by the defendant. They represented a compromise in which the plaintiffs gave up their right to seek further relief and the defendant waived its right to litigate its various defenses. One aspect of this compromise was the unambiguous preservation of the defendant's *bona fide* seniority system.

The court had no authority to abrogate this compromise without at least giving the defendant an opportunity for a hearing on the question of liability. It is well settled that, absent such a hearing, a consent decree that was entered into prior to a finding or admission of liability may not be modified so as to impose additional new duties upon the defendant. Rather, the court administering the decree must respect the conditions upon which rights were waived and confine itself to the agreement to which the parties consented—even if the court believes that a different agreement would better effectuate the purposes of one of the parties to the decree.

As this Court explained in *United States* v. *Armour & Co.*, 402 U. S. 673, 681-682 (1971) (footnote omitted):

> "Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. Thus the decree itself cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it. ***Because the defendant has, by the decree, waived his right to litigate the issues raised,*** a right guaranteed to him by the Due Process Clause, ***the conditions upon which he has given that waiver must be respected, and the instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation.***" (emphasis supplied)

By requiring that the conditions upon which a defendant waived his right to litigate his liability be respected, this Court has prohibited unbargained-for duties from being written into a consent decree under the guise of construction. If the court or plaintiff believes that subsequent events have made the defendant's original promises inadequate to fulfill the purposes of the decree, the proper course is not to modify the decree to change the scope of the defendant's duties, as the courts did here, but rather to litigate the question of liability and then, depending upon the outcome, to fashion new relief on that basis. See *Flexibility and Finality In Antitrust Consent Decrees*, 80 Harv. L. Rev. 1303 (1967).

In *Hughes* v. *United States*, 342 U. S. 353 (1952), this Court made it clear that modification through such a retrial is the only proper course of action. There, the United States had entered into a consent decree, prior to trial, in which Hughes had agreed either to sell his stock in certain motion picture companies or to deposit the stock with a voting trustee. Hughes chose to make the deposit. Thereafter, the United States petitioned the district court to force Hughes to sell his stock in order to better effectuate the purposes of the decree. The district court granted the requested relief. This Court reversed, unanimously.

This Court noted that Hughes had never promised to sell his stock. As a consequence, absent an adjudication on the merits, the district court had no authority to order a sale, notwithstanding provisions in the decree reserving jurisdiction to amend and the inherent equity powers of the court:

> "We entertain no doubt concerning the District Court's power to require sale of Hughes' stock after a proper hearing.... But there has been no adequate hearing of this issue as to Hughes. Neither when the present order was considered nor when the original decree was entered where any findings of fact made to support an order of compulsory sale of Hughes stock. As previously

> pointed out the consent of Hughes did not include consent to make him sell. At every stage Hughes objected to the order forcing sale of his stock without a hearing that included evidence and a judicial determination based on it." *Id.* at 357-358.

See also *United States* v. *Atlantic Refining Co.*, 360 U. S. 19, 23 (1959) (Plaintiff's argument based on "purposes" of decree "does not warrant our substantially changing the terms of a decree to which the parties consented without any adjudication of the issue"); *United States* v. *Armour Co.*, 402 U. S. 673, 681 (1971) (Argument based on purposes of consent decree "might be a persuasive argument for modifying the original decree, *after full litigation* . . . .") (emphasis added); *Fox* v. *United States Department of Housing & Urban Development*, 680 F. 2d 315, 323 (3d Cir. 1982) ("To impose additional duties under the decree because of [certain foreseeable changed circumstances] is to disregard the basic rights of litigants who waive their right to litigate defenses by consenting to have a decree entered against them. The conditions upon which rights are waived must be respected.")[1]

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[1] In *Fox*, the plaintiff had entered into a consent decree with HUD, prior to any determination of liability, whereby HUD had agreed to provide plaintiff certain assistance in the construction or rehabilitation of various housing units. After the decree was entered, the plaintiff sought additional aid from HUD. When HUD refused, plaintiff successfully petitioned the district court for a construction and modification of the consent decree giving it additional aid essential to the housing project.

The Third Circuit reversed. The court noted that the terms of the decree did not cover the additional assistance and that "[t]he instrument must be construed as it is written . . . and not as one of the parties would have written it had it ultimately prevailed." *Id.* at 322. (citations omitted) The court then held that, absent a hearing on liability, the decree could not be modified so as to require additional aid from HUD because it would be improper to "impose additional duties upon a defendant party to a consent decree without an adjudication or admission that the defendant violated the plaintiffs' legal rights reflected in the consent decree and that modification is essential to remedy the violation." *Id.* at 323.

Similarly, in this case, the conditions upon which the fire department waived its right to litigate its defenses must be respected. Those conditions included the retention of the seniority system set forth in the 1974 decree. Absent some liability predicate, the district court had no power to modify the consent decree to impose additional new duties upon the fire department.

B. A Desire To Achieve Racial Balance Is Not A Permissible Purpose Of A Consent Decree.

Apart from the general prohibition on creating unbargained-for obligations based on the "purpose" of a consent decree, the Sixth Circuit erred by selecting as the purpose of the 1980 decree the creation of racial balance in the fire department. On its face, the decree was designed to eliminate discrimination in hiring and promotion. The decree used racial proportionality in the work-force as a long-term goal, based, no doubt, on the assumption articulated in *International Brotherhood of Teamsters* v. *United States,* 431 U. S. 324, 340 n.20 (1977), that even-handed hiring and promotion will eventually produce a racially balanced work-force. In its opinion, however, the Sixth Circuit took the concept of racial balance out of this limited context and made it into a separate purpose to be pursued for its own sake. In so doing, the court clearly erred.

The proposition that each identifiable ethnic and racial group is "entitled" to a proportionate share, and only that share, of public jobs is repugnant to the Constitution and civil rights laws. As this Court stated in *Furnco Construction Corp.* v. *Waters,* 438 U. S. 567, 579 (1978):

> "It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force." (Emphasis in original.)

Indeed, the legislative history of Title VII makes it clear that an agreement to achieve or maintain racial balance in the work-force for its own sake, not only is not required, but would in itself violate Title VII:

> "There is no requirement in Title VII that an employer maintain a racial balance in his workforce. *On the contrary, any deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve the violation of Title VII* because maintaining such a balance would require an employer to hire or to refuse to hire on a basis of race. It must be emphasized that discrimination is prohibited as to any individual." (emphasis supplied). 110 Cong. Rec. 7213 (1964) (remarks of Senators Clark and Case).

Thus, even if the purpose of the consent decree in this case was not simply to end discrimination in hiring and promotion practices, but also to ensure proportional representation in various job categories in the work-force, that purpose could not properly form the basis for injunctive relief.

C. There Was No Finding Of Liability That Could Provide A Basis For An Injunction Abrogating A *Bona Fide* Seniority System.

In holding that plaintiffs had established a probability of success, both courts below appeared to be relying not only on the 1980 consent decree, but also on the notion that the plaintiffs could have demonstrated racial discrimination in hiring and promotion prior to 1980. Thus, the district court took "judicial notice" of the past discrimination and the Sixth Circuit stated that, based on the statistical evidence, plaintiffs could have made out a *prima facie* case of discrimination. In holding that this "evidence" demonstrated a probability of success on the merits of plaintiffs' attempt to abrogate the *bona fide* city-wide seniority system, the courts erred in at least three respects.

First, before a determination of liability was made, defendants, who had always denied the discrimination charges, were

entitled to a hearing on the issue. The remedial powers of the federal courts may "be exercised only on the basis of a violation of the law and [may] extend no farther than required by the nature and extent of that violation." *General Building Contractors* v. *Pennsylvania,* 102 S. Ct. 3141, 3154, 50 U. S. L. W. 4975 (1982). While it was not inappropriate for the district court to take judicial notice of the statistics concerning the racial makeup of the fire department, those statistics by themselves were insufficient to establish a finding of liability. See *Furnco Construction Corp.* v. *Waters,* 438 U. S. 567, 576 (1978) ("the Court of Appeals went awry . . . in apparently equating a prima facie showing under McDonnell Douglas with an ultimate finding of fact as to discriminatory refusal to hire under Title VII; the two are quite different. . . .") Although this case was at a preliminary injunction stage, surely the defendants were entitled to more consideration of whether they had violated the law than the trial judge's casual remark that it would be "naive" not to assume that discrimination had existed.

Second, and more important, even if there had been discrimination prior to 1980, that fact alone could not be used to justify the abrogation in 1981 of a *bona fide* seniority system. Such seniority systems are specifically protected by Title VII even though their operation has a disparate impact on minority employees and even though the disparate impact results from past discrimination in hiring. *International Brotherhood of Teamsters* v. *United States,* 431 U. S. 324 (1977); *American Tobacco Co.* v. *Patterson,* 456 U. S. 63 (1982).

The courts are permitted to disturb the operation of a *bona fide* seniority system only to the extent necessary to provide appropriate relief for the actual victims of discrimination. In *International Brotherhood of Teamsters* v. *United States,* 431 U. S. 324, 365 (1977), this Court specifically limited retroactive seniority to identifiable victims of discrimination. The Court thus held that a lower court decision to grant retroactive

seniority on a class-wide basis to every minority employee was improper; instead, this Court held that retroactive relief should have been limited to those persons who in the past had actually applied for employment and been rejected or who had been discouraged from applying because of the discrimination.[2]

As this Court's decisions subsequent to *Teamsters* have made clear, it is never proper to abrogate a *bona fide* seniority system or to force the layoff and demotion of employees to protect minority workers who have not shown themselves to be victims of past, proven discrimination. Any other rule would unfairly sacrifice "the rights and expectations of perfectly innocent employees." *Guardian Ass'n* v. *Civil Service Commission* 51 U. S. L. W. 5105, 5112 (1983) (White, J.), quoting from *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 787 (1976) (Powell, J.), and affront the basic principle "that Title VII requires employers to treat their employees as *individuals*, not 'as simply components of a racial, religious, sexual or national class.'" *Arizona Governing Committee* v. *Norris*, 51 U. S. L. W. 5243, 5245 (1983), quoting from *Los Angeles Department of Water & Power* v. *Manhart*, 435 U. S. 702, 708 (1978) (emphasis in the original).

Thus, even if there had been an appropriate finding of past discrimination in this case, such a finding could not provide a basis for the court's interference with the functioning of a *bona fide* seniority system.

Finally, the injunction at issue here was also beyond the courts' power if it was intended not to remedy past dis-

[2] Although the case at bar also involved a charge of discrimination in violation of 42 U. S. C. §§ 1983 and 1981, the same limits on the courts' power apply. As the Third Circuit stated in *Gurmankin* v. *Costanzo*, 556 F. 2d 184, 188 (3d Cir. 1977), "There is no distinction in the law of equitable remedies under Title VII and suits brought in reliance on 42 U. S. C. § 1983, or directly on the fourteenth amendment."

crimination, but rather to preserve the gains that had been achieved in reaching the "goal" of racial proportionality. In *Pasadena* v. *Spangler*, 427 U. S. 424 (1976), this Court dealt with a situation where schools desegregated by court order had become racially imbalanced once again through population shifts that had not been found to be the result of actionable discrimination. The Court held that a federal court had no power to issue a remedy designed to correct such an imbalance. In so holding, the Court relied on its earlier determination in *Swann* v. *Board of Education*, 402 U. S. 1, 24 (1971), that there is no "substantive constitutional right [to a] particular degree of racial balance or mixing." Thus, once the constitutional violation has been remedied, a court has no power to issue additional decrees in order to maintain racial proportionality.

The same analysis applies here. The district court specifically found that there was no purposeful discrimination in the lay-offs themselves, and there has been no finding that the City failed to eradicate discrimination in its hiring and promotion practices. Once the City of Memphis had cured its past practices of discrimination and had properly compensated identifiable victims of past discrimination, the court had no power to reach out beyond the terms of the consent decree to require the City to do more. To hold otherwise would be utterly inconsistent with *Spangler* itself, which denies any claimed constitutional right to racial balance. As noted above, it would also be inconsistent with the concept of individual opportunity that our Constitution and civil rights laws embody.

II. The Lower Courts Failed To Balance The Harms Appropriately.

The courts below also erred in finding that plaintiffs would suffer irreparable harm if the injunction was not issued and that that harm outweighed the burden imposed on innocent white employees when it was issued. Although it is true that certain black employees would have been injured if the injunction had not issued, the courts ignored the fact that, unless they were

victims of past discrimination, these employees had no right to protection from lay-offs under a *bona fide* seniority system. The courts also declined to recognize the significant burdens imposed on white employees who *did* have a legitimate expectation of protection under the seniority system. This was clearly error. As Justice Powell stated in his concurring opinion in *Fullilove* v. *Klutznick,* 448 U. S. 448, 514 (1980):

> "A race-conscious remedy should not be approved without consideration of an additional crucial factor—the effect of the set-aside upon innocent third parties."

In cases where this Court has approved race-conscious remedial programs, the "expectations" that were frustrated have involved an ability to compete for certain benefits such as new jobs, promotions, future contracts and the like. In those cases the Court has determined that any injury to white employees' expectations of future benefits has been offset by the need to counteract prior pervasive discrimination. Thus, in *United Steelworkers of America* v. *Weber,* 443 U. S. 193 (1979), white employees were foreclosed from applying for half of the openings in a new craft training program established specifically to remedy the past effects of segregation in certain job categories. The Court noted that white employees could still compete for the remaining half of the openings and that, in any event, the plan was "a temporary measure" to eliminate "conspicuous racial imbalance in traditionally segregated job categories." The plan did *not* require the "discharge of white workers and their replacement with new black hirees." Under these circumstances, this Court found that the plan did not "unnecessarily trammel the interests of the white employees." 443 U. S. at 208.

Similarly, in *Fullilove* v. *Klutznik, supra,* Congress had foreclosed white contractors from bidding on only 10% of new federal contracts worth $4 billion, with waiver provisions in the event that qualified minority contractors could not be found. In his concurring opinion, Justice Powell concluded that any

"marginal unfairness to innocent nonminority contractors is not sufficiently significant—or sufficiently identifiable—to outweigh the compelling governmental interest in redressing the [purposeful] discrimination that affects minority contractors." 448 U. S. at 515.[3]

Here, on the other hand, the burden imposed on individual employees merely because they are white is clear and immediate. To impose that burden solely because of the color of their skin for the purpose of protecting one racial group's supposed share of public jobs is clearly not permissible under our Constitution and civil rights laws. Nor is it in the public interest. For even if the intent is a benign one, the allocation of benefits and burdens on a quota basis is inevitably destructive, postponing rather than hastening the day "when no governmental decision will be based upon immutable characteristics of pigmentation or origin," *Fullilove* v. *Klutznick, supra,* 448 U. S. at 516 (Powell, J.). As Justice Powell observed in *University of California Regents* v. *Bakke*, 438 U. S. 265, 298 (1978):

> "[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth."

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[3] In addition, it should be noted that neither *Weber* nor *Fullilove* involved a court-ordered remedy. *Weber* was a voluntary affirmative action plan; *Fullilove* involved the power of Congress under § 5 of the Fourteenth Amendment to spend federal funds in a way that would tend to redress past intentional discrimination. In both cases, the Court recognized that imprecision in the means of remedying the past discrimination could be tolerated.

Here, it is a court-ordered remedy that is at issue. It is well-settled that in framing an equitable decree, the district court must "tailor 'the scope of the remedy' to fit 'the nature and extent of the . . . violation' " proved. *Dayton Board of Education* v. *Brinkman*, 443 U. S. 406, 420 (1977); see also *General Building Contractors Ass'n., Inc.* v. *Pennsylvania*, 102 S. Ct. 3141, 3154, 50 U.S.L.W. 4975 (1982).

And as Professor Bickel stated in The Morality of Consent 133 (1975):

> "[A] racial quota derogates the human dignity and individuality of all to whom it is applied; it is invidious in principle as well as in practice. Moreover, it can as easily be turned against those it purports to help. The history of the racial quota is a history of subjugation, not beneficence. Its evil lies not in its name but in its effect; a quota is a divider of society, a creater of castes, and it is all the worse for its racial base, especially in a society desperately striving for an equality that will make race irrelevant."

CONCLUSION

The basis for the *amicus'* long-time opposition to racial quotas is made manifest by this case, where innocent employees have been forced out of their jobs on the basis of race. It is not enough to wish to correct racial injustice. The means used must not compound the evil that is sought to be remedied and must not go beyond the law and the Constitution to reach what is thought to be a just result for one class of people at the expense of others.

For the foregoing reasons, the judgment of the court below should be reversed.

Respectfully submitted,

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